

SUPPLEMENTAL McNAMARA DECLARATION
EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS LLC,
JOHN WILEY & SONS, INC., and
PENGUIN RANDOM HOUSE LLC,

Plaintiffs,

vs.

No. 1:20-cv-04160-JGK

INTERNET ARCHIVE and DOES 1
through 5, inclusive,
Defendants.

_____ /

-- ATTORNEYS' EYES ONLY --

VIDEOTAPED RULE 30(B)(1) AND 30(B)(6) DEPOSITION
OF HACHETTE BOOK GROUP, INC., BY ALISON LAZARUS
Remote Zoom Proceeding
Rye Brook, New York
Friday, November 12, 2021

REPORTED BY:

LESLIE ROCKWOOD ROSAS, RPR, CSR 3462

Pages 1 - 254

Job No. 4867752

Page 1

1 Has Hachette conducted any analysis regarding
2 the effect of library lending on physical book revenues?

3 A. We have no -- no, we haven't. There's no way to
4 do that.

5 Q. Tell me a little bit about why there's no way to 10:41:58
6 do that. What does that mean?

7 A. You can't determine what somebody didn't buy.
8 So if somebody borrows a book from a library, we don't
9 know that they'll -- under different circumstances, they
10 might have bought a book, a physical book instead. 10:42:24
11 There's just no way to measure sales you didn't get.

12 Q. Same question but with respect to eBook revenue.

13 Has Hachette conducted any analysis about the
14 effect of library lending on eBook revenue?

15 A. Yes, we have. 10:42:47

16 Q. Okay. What kind of analysis?

17 A. We've compared our retail sales rates and
18 corresponding -- corresponding rates of library reads,
19 what we would call circulations. So we look at the rate
20 of circulations going up, let's say, and look at the rate 10:43:14
21 of retail eBook sales going down and, you know.

22 So we do that kind of analysis. And in that
23 case, we -- we have the data to -- to look at those two
24 types of sales.

25 Q. How often is that kind of analysis conducted? 10:43:35

1 A. We do a kind of short monthly analysis on
2 library circulation, and then a bigger analysis like that
3 would be maybe every six months.

4 Q. And the monthly analysis of circulation is
5 compared to monthly revenues? 10:44:01

6 A. It's really looking at the rate of circulation,
7 let's say, this year compared to last year or -- yeah,
8 that's generally what we're looking at.

9 Q. Okay. But when you conduct the analysis
10 monthly, are you looking at, for example, if you were 10:44:22
11 looking at June of 2021, would you be comparing to June
12 of 2020?

13 A. Yes, or maybe even June 2019. Sometimes more
14 than one year.

15 Q. And could you explain a little bit about how the 10:44:43
16 library circulation monthly data is analyzed with respect
17 to the revenue data that you have?

18 A. So libraries will, you know, buy a copy of an
19 eBook, and then they can lend it numerous times over the
20 course of the term, the two-year term. So we look at the 10:45:10
21 revenue versus the circulations and come up with a -- you
22 know, a cost-per-circ estimate, and that's something we
23 compare over time to understand the financial trends in
24 lending.

25 Q. Okay. How does that data -- actually, strike 10:45:37

1 that.

2 Is Hachette able to use that data to perform any
3 analysis about the effect of library eBook lending on
4 library retail sales?

5 MS. MCNAMARA: Objection. This is very 10:45:58
6 confusing. Do you understand the question, Alison?

7 THE WITNESS: No. I was just going to say I'm
8 not sure what you mean about library retail sales because
9 libraries aren't retailers.

10 Q. BY MS. LANIER: That was a verbal error on my 10:46:12
11 part. Thank you for giving me a chance to clarify.

12 What I was trying to ask, but inartfully, is
13 whether Hachette is able to use the types of data we were
14 just talking about to analyze the effect of library eBook
15 lending on retail sales of eBooks. 10:46:29

16 A. We -- we do try to do that. It's -- it's, you
17 know, speculative because you can't truly directly make
18 that correlation, meaning, again, I -- we can't tell, you
19 know, why somebody borrowed a book versus buying the
20 book. So we look at the trends to try to understand 10:46:58
21 what's happening in both markets, and we do use that data
22 to inform our decision making.

23 Q. BY MS. LANIER: When you say "to inform our
24 decision making," what do you mean by that?

25 A. Looking at our approach to the retail eBook 10:47:21

1 market, how we might market our books there, working with
2 our library vendors to help promote certain types of
3 titles that might be underperforming. So just general,
4 you know, market data, trying to understand where there
5 are opportunities and where we -- we might want to 10:47:46
6 rethink something.

7 Q. Does the term "cannibalized" get used with
8 respect to -- strike that.

9 Are you familiar with the term "cannibalized" in
10 terms of revenues and sales in that context? 10:48:07

11 A. Yes.

12 Q. Is Hachette concerned or Hachette -- has
13 Hachette expressed concerns about the effect that
14 libraries have on retail sales of books?

15 A. Yes, we've had -- we've had some concerns as the 10:48:28
16 lending trend have gone up and the retail trends have
17 gone down.

18 Q. But beyond the analysis that -- that we've
19 discussed today, is there any additional analysis or
20 investigation into whether libraries actually do 10:48:54
21 cannibalize sales of books?

22 MS. MCNAMARA: Objection. Vague, ambiguous.

23 THE WITNESS: Again, there are limits to what
24 we're able to understand and get data for, and so we are
25 constantly looking at our sales in all channels and 10:49:15

1 trying to understand what's happening in the marketplace
2 to the best of our ability, but there are limits to the
3 depth and detail that we have access to.

4 Q. BY MS. LANIER: You mentioned trends of eBook
5 retail sales and trends of library eBook circulation. 10:49:37
6 Has it been your observation in the last, let's say from
7 2017 or so on, that decreases in eBook revenue correspond
8 to increases in library circulation of eBooks?

9 A. It's been my observation that as library lending
10 has become more popular and the circulations have gone up 10:50:12
11 that retail sales for eBooks have gone down, yes.

12 Q. But as you have testified before, you don't know
13 for sure if there is a causal relationship between those
14 two things that are occurring at the same time?

15 MS. MCNAMARA: Objection. Mischaracterizes her 10:50:36
16 testimony.

17 THE WITNESS: To the best of our ability to
18 interpret the data that we have, we think there is maybe
19 a causal relationship.

20 Q. BY MS. LANIER: What about the data makes you 10:50:49
21 think there is a causal relationship between those two
22 things?

23 A. The -- the rise in circulation statistics for,
24 in particular, you know, kind of popular frontlist
25 authors and the corresponding decline in what we would 10:51:14

1 call à la carte sales for those authors of retail in
2 eBook format.

3 Q. But what about the rise in circulation
4 statistics and the decline in à la carte sales makes you
5 think, makes you conclude or makes you believe that there 10:51:39
6 is a causal relationship between those two things?

7 A. Again, you know, we can't prove it, but there
8 don't seem to be other, you know, significant extenuating
9 factors that would, you know, create such a drastic
10 shift. Although there are other things happening in the 10:52:07
11 marketplace that may have an impact, it's just that we
12 don't have the data to support that.

13 Q. Okay. When you said there are other things
14 happening in the marketplace, are you thinking of
15 anything specific? 10:52:28

16 A. Things like the -- you know, the Kindle
17 Unlimited program might be one. Piracy is another.
18 Those -- those are the two that kind of come to mind.

19 Q. And this is very possibly a dumb question so
20 forgive me: But what is the Kindle Unlimited program? 10:52:50

21 A. It's a subscription -- an eBook subscription
22 program that Amazon offers with -- you pay a flat monthly
23 fee and you get unlimited digital reading. Hachette does
24 not participate in that program.

25 Q. Excuse me. And when we've been talking about 10:53:21

1 in and let me know what you interpret that sentence to
2 mean.

3 A. "IA not only conflates print books and eBooks,
4 it ignores the well-established channels in which
5 publishers do business with bookstores, e-commerce 11:03:58
6 platforms, and libraries, including for print and eBook
7 lending."

8 MS. MCNAMARA: And I caution the witness that
9 you should look at the context. You don't just be
10 directed at a particular sentence. Make sure that you 11:04:14
11 have an opportunity to understand the context of the
12 document.

13 THE WITNESS: Yes.

14 MS. LANIER: She's absolutely right. I was
15 remiss in not giving you enough time to look at the whole 11:04:24
16 document. Please do so if that's helpful to you.

17 THE WITNESS: Yes, please. Thank you.

18 Okay. So I'm sorry, can you repeat the original
19 question?

20 Q. BY MS. LANIER: Certainly. 11:06:34

21 So in the paragraph that starts "and willfully
22 ignoring the Copyright Act" --

23 A. Uh-huh.

24 Q. -- what does the phrase "conflates the separate
25 markets and business models made possible by the 11:06:47

1 statutes, incentives, and protections" mean to you?

2 A. It means that Internet Archive is creating an
3 eBook from a print book, and those are two separate
4 formats, two separate business models that we support for
5 our authors and that we do not think of as one item that 11:07:15
6 can be shared. There are two distinct ways of reading
7 that we treat very separately.

8 Q. And in the next paragraph, the one that starts,
9 "This lawsuit is not about the occasional transmission,"
10 do you see that paragraph? 11:07:45

11 A. Uh-huh.

12 Q. Have you had a chance to read that paragraph
13 yet?

14 A. Yes.

15 Q. Do you see the phrase towards the -- it's the 11:07:52
16 second line from the bottom of the page, and it says:
17 "Purposely denigrating their commercial value."

18 Do you see that phrase?

19 A. Let me get there.

20 Q. Sure. 11:08:08

21 A. Yes, I see it.

22 Q. Does Hachette have any evidence that the
23 Internet Archive has purposely denigrated the commercial
24 value of books?

25 A. Well, by making scans of print books, that -- we 11:08:44

1 believe that is purposefully denigrating the commercial
2 value. EBooks have their own commercial value that
3 authors are entitled to receive royalties from, and print
4 books have a different set of terms that authors receive
5 royalties from.

11:09:08

6 So by creating scans and treating them as from a
7 print book that wasn't purchased from us and an eBook
8 that wasn't purchased from us, it does denigrate their
9 commercial value, and it makes it free to the consumer
10 without restriction, without them paying for it or being
11 a library member.

11:09:28

12 Q. To Hachette, the scanning of the physical book
13 is the purposeful denigration of the commercial value of
14 the book?

15 MS. MCNAMARA: Objection.

11:09:49

16 Just a second.

17 Objection. That's willfully misrepresents the
18 witness' testimony.

19 MS. LANIER: That willfully misrepresents my
20 question, actually.

11:09:56

21 Please go ahead.

22 MS. MCNAMARA: Well --

23 THE WITNESS: It isn't -- it's the scanning, but
24 also making available a digital copy that wasn't
25 authorized by us, that isn't protected by -- that isn't,

11:10:10

Page 50

1 you know, under our auspices as a copyrighted format. So
2 it's -- it's just taking an item and turning it into
3 something else that wasn't authorized or doesn't comply
4 with our terms of sale and our approach to the
5 marketplace.

11:10:32

6 Q. BY MS. LANIER: Are you finished with your
7 answer?

8 A. Uh-huh.

9 Q. I wasn't able to tell.

10 So apart from scanning and making available for
11 borrowing, does Hachette have other grounds for thinking
12 that the Internet Archive is purposely denigrating the
13 commercial value of books?

11:10:44

14 A. I have to think about that for a second.

15 The availability, the premise behind the
16 Internet Archive's making eBooks available on the site in
17 the way that they do denigrates our standard business
18 practices, and I think to the consumer presents a very
19 different kind of lending experience that doesn't support
20 copyright, doesn't support our authors, doesn't support
21 our relationship with libraries, and in fact, is very
22 counter to how we try to conduct business in a very clear
23 and collaborative way with our existing eBook partners.

11:11:22

11:11:53

24 Q. Could you scroll to HACHETTE0011118, please. It
25 will be the last page in this document.

11:12:23

Page 51

1 STATE OF CALIFORNIA) ss:

2 COUNTY OF MARIN)

3
4 I, LESLIE ROCKWOOD ROSAS, RPR, CSR NO. 3462, do
5 hereby certify:

6 That the foregoing deposition testimony was
7 taken before me at the time and place therein set forth
8 and at which time the witness was administered the oath;

9 That testimony of the witness and all objections
10 made by counsel at the time of the examination were
11 recorded stenographically by me, and were thereafter
12 transcribed under my direction and supervision, and that
13 the foregoing pages contain a full, true and accurate
14 record of all proceedings and testimony to the best of my
15 skill and ability.

16 I further certify that I am neither counsel for
17 any party to said action, nor am I related to any party
18 to said action, nor am I in any way interested in the
19 outcome thereof.

20 IN WITNESS WHEREOF, I have subscribed my name
21 this 18th day of November, 2021.

22
23
24 

25 LESLIE ROCKWOOD ROSAS, RPR, CSR NO. 3462